

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

SANTOS FUENTES)	
Claimant)	
VS.)	
)	
IBP, INC.)	Docket No. 196,242
)	
Respondent)	
Self-Insured)	

ORDER

Claimant requested review of the Award dated September 29, 1997, entered by then Assistant Director Brad E. Avery. The Appeals Board heard oral argument on March 25, 1998. Appeals Board Member Gary Korte recused himself from these proceedings and in his place Stacy Parkinson was appointed by the Workers Compensation Director to serve as Appeals Board Member Pro Tem.

APPEARANCES

Stanley R. Ausemus of Emporia, Kansas, appeared for the claimant. Greg Worth of Lenexa, Kansas, appeared for the respondent, a qualified self-insured.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are set forth in the Award.

ISSUES

The Assistant Director denied claimant's request for disability benefits on the basis claimant failed to prove he was disabled for a period of at least one week from earning full wages at his employment. Claimant requested that the Appeals Board review that finding.

Claimant also requested that the Appeals Board decide the nature and extent of claimant's disability. At oral argument, the parties agreed that if the Appeals Board decides the first issue in claimant's favor, then the Board may also decide that remaining issue instead of remanding this case to the ALJ.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds as follows:

The parties stipulated to the compensability of this claim. But the award was limited to medical compensation only. Claimant alleges he is also entitled to disability benefits for the repetitive use injuries he received to his left hand, arm and shoulder that culminated on May 17, 1994.

Claimant continued to work for respondent until November 16, 1994. He testified the work made his pain worse. The Appeals Board notes claimant's job was modified to light duty. Dr. Myron J. Zeller testified that after he first saw claimant on May 20, 1994, claimant was placed on light duty with no hand-intensive labor and no knife or hook use for three weeks. Thus, although claimant did not miss one consecutive week from work, he was disabled from the work he was doing at the time of his accident because he was placed on light duty and his job duties changed due to the injuries.

Dr. Pedro A. Murati reported claimant "complains of left shoulder pain which started around the time that his light duty ended and he was placed back on regular work." Claimant eventually left his job with respondent and went to work elsewhere performing lighter duty work. But the record does not establish that claimant left work at IBP because of his work-related injuries.

Respondent argues that because K.S.A. 44-501(c) applies to this claim, claimant is only entitled to his medical expenses. The Appeals Board disagrees.

Claimant received ongoing medical care and missed work due to his injury for medical treatment. He missed two full days from work for medical treatment and two hours each on six other days. Claimant testified he was not paid for this lost time. Therefore, claimant argues, this also constitutes being disabled one week from earning full wages as required by K.S.A. 44-501(c) and claimant is entitled to receive permanent partial disability benefits because the "period of at least one week" refers to wages and need not be consecutive full days.

At the time of claimant's injury, the statute provided in pertinent part:

Except for liability for medical compensation, as provided for in K.S.A. 44-510 and amendments thereto, the employer shall not be liable under the workers compensation act in respect of any injury which does not disable the employee for a period of at least one week from earning full wages at the work at which the employee is employed.

In Boucher v. Peerless Products, Inc., 21 Kan. 977, 911 P.2d 198, *rev. denied* 260 Kan. 991 (1996), the court found K.S.A. 44-501(c) to be plain and unambiguous that compensation to an injured employee is limited to medical expenses if the employee is not disabled for at least one week from earning full wages at the work for which he or she is employed.

After claimant's injuries, K.S.A. 44-501(c) was amended to delete the above-quoted section. K.S.A. 1996 Supp. 44-501(c). This amendment provided that it was to be applied

to injuries that occurred prior to April 4, 1996, the effective date of the amendment, unless the claim had been fully adjudicated. K.S.A. 1996 Supp. 44-501a.

In *Osborn v. Electric Corp. of Kansas City*, 23 Kan. App. 2d 868, 936 P.2d 297, *rev. denied* 262 Kan. ____ (1997), a case involving the retroactive application of the amended section of 44-501(c), the Court of Appeals held, *inter alia*: "In workers compensation cases, the law in effect at the time of the injury governs the rights and obligations of the parties." 23 Kan. App. 2d 868, Syl. ¶ 8. Thus, the 1996 amendment to K.S.A. 44-501(c) had prospective application only and did not apply to this claimant's claim for compensation.

The Appeals Board concludes that claimant was disabled for more than one week from the work he was doing at the time of his accident because he was placed on light duty for three weeks. Thus, for those weeks claimant was on light duty, he was disabled from the work he was doing when he was injured. Also, claimant did not receive full wages for the weeks he missed work while seeking medical treatment. Missing work for medical treatment related to the accident is equivalent to being disabled from earning wages. As such, claimant is entitled to receive an award for disability benefits.

Claimant seeks a 20 percent permanent partial disability award to the level of the shoulder based upon the functional rating given by Dr. Murati. In arriving at the rating, Dr. Murati relied upon the AMA Guides to the Evaluation of Permanent Impairment, Third Edition (Revised). Dr. Murati's deposition was not taken but his February 5, 1996 court-ordered IME report is a part of the record. The problem with Dr. Murati's rating is that he examined claimant almost two years after the date of accident and some 15 months after claimant ceased working for respondent. During this intervening period, claimant worked at other hand-intensive jobs that could have aggravated his condition. It appears from his report that Dr. Murati was not fully aware of claimant's post-accident work history.

Claimant did not complain about his wrist, arm or left shoulder when he was being examined and treated by Dr. Zeller and Dr. Zeferino J. Arroyo. Claimant saw Dr. Arroyo on January 9, 1995, which was after claimant had left work with respondent. Furthermore, claimant had normal nerve conduction studies after he left respondent and before he went to work at Simmons and O. K. Industries. The first indication of nerve entrapment was during Dr. Murati's test. Therefore, Dr. Murati's findings concerning the shoulder and arm problems cannot be attributed to claimant's employment with respondent. Claimant's award should be limited to Dr. Murati's finding of a 20 percent impairment to the third finger. This is the only condition claimant reported and was treated for while employed with respondent.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Assistant Director Brad E. Avery dated September 29, 1997, should be, and is hereby, modified as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Santos Fuentes,

and against the respondent, IBP, Inc., a qualified self-insured, for an accidental injury which occurred May 17, 1994, and based upon an average weekly wage of \$378.66 for 4 weeks at the rate of \$252.45 per week or \$1,009.80, for a 20% permanent partial scheduled disability.

Respondent is ordered to pay all reasonable and related medical expenses.

An unauthorized medical allowance of up to \$500 is awarded upon presentation to respondent of an itemized statement verifying same.

Future medical is awarded upon proper application to and approval by the Director.

Claimant's attorney fee contract is hereby approved insofar as it is not inconsistent with K.S.A. 44-536.

The fees necessary to defray the expense of the administration of the Kansas Workers Compensation Act are hereby assessed against the respondent to be paid as follows:

Underwood & Shane	
Transcript of Regular Hearing	\$186.00
Cindy L. Fenton, CSR	
Deposition of Myron Zeller, M.D.	Unknown
Deposition of Zeferino Arroyo, M.D.	Unknown
Linda Caswell Spence	
Deposition of Christine Terry	Unknown
Deposition of Richard Brigger	Unknown

IT IS SO ORDERED.

Dated this ____ day of October 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Stanley R. Ausemus, Emporia, KS
Greg Worth, Lenexa, KS
Brad E. Avery, Administrative Law Judge

SANTOS FUENTES

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DOCKET NO. 196,242

Philip S. Harness, Director